

Examiners' Comments on the 2015 Examination

Head I: Conveyancing

The majority of candidates performed well in this examination. Some candidates have a tendency to write everything they know about a problem. Even if they eventually give a good answer this technique might leave them short of time. In some cases candidates have difficulty applying the law to the facts. This was the case in particular in questions 1.1, 3.2 and 4.1.

Question 1

1.1 This question is about the tacking of further advances and section 45 of the Conveyancing and Property Ordinance Cap. 219 (CPO). B Ltd is not an authorised institution as required under s 45(1)(c). S 45(1)(b) does not apply because the mortgage is an 'all monies' mortgage.

1.2 B's second loan cannot be tacked to its Second Mortgage.

However, as a result of B Ltd advancing the second loan to discharge the prior mortgage in favour of A Ltd, B Ltd would enjoy priority over C Ltd by virtue of its equitable right of subrogation. Candidates should consider *Financial and Investment Services Asia Ltd v Baik Wah International Trading Co Ltd* [1985] HKLR 103 followed in *Hong Kong Chinese Bank Ltd v Sky Phone Ltd* [2001] 1 HKC 50. The equitable interest of B Ltd is unwritten and priority is determined by common law rules. The fact that A Ltd's mortgage has been discharged is not a bar to B Ltd relying on its provisions to give it priority over C Ltd.

Question 2

2.1 This question is about whether the demolished wall is a common part or whether it belongs to the flat owners on either side of the wall. Candidates should consider whether the Deed of Mutual Covenant and the First Assignments of Flats 15 A and B allocate ownership of the wall and also consider *Tam Sze Man v Incorporated Owners of Shan Tsui Court* [2011] 5 HKLRD 434 and *Incorporated Owners of Westlands Gardens v Oey Chiu Ling* [2011] 2 HKLRD 421.

2.2 This question is about the duty of the Owners' Corporation to enforce the Deed of Mutual Covenant (DMC) under s 18(1)(c) Building Management Ordinance Cap. 344 (BMO) and the defence of waiver: *Wa Fan v Incorporated Owners of Ki Tat Garden (Phase 1)* [2003] 3 HKLRD 1, CA and *IO of Hoi Luen Industrial Centre and Anor v Ohashi Chemical Industries (Hong Kong) Ltd* [1995] 2 HKC 11.

2.3 This question is about the passing of the burden of covenants in the DMC under ss 41(3) and (2) and 40 CPO. Candidates should consider whether the covenant not to keep pets relates to land of the covenantor and whether the burden is expressed or intended to pass.

- 2.4 Candidates must consider whether external walls are common parts and the provisions of s 2 and the First Schedule to the BMO. This question is about the duty of the Owners' Corporation to maintain common parts under s 18(1) BMO.
- 2.5 Candidates must consider whether the pipes and damaged areas are common parts or exclusive use areas. This question is about the duty of owners to keep their exclusive use areas in good repair under the terms of the DMC or s 34H BMO. In addition candidates must consider the power of the Owners' Corporation to bring proceedings if the common parts are damaged and Candy's right to bring proceedings if her exclusive use areas are damaged.

Question 3

- 3.1 This question is about execution of an Assignment dated 2005 by a limited company. Candidates should mention ss 23A(1) and (2) and s 20(1) CPO which do not apply in this case. Candidates should also consider whether s 23 CPO applies and whether further evidence of proper execution (such as the Articles of Association and a board resolution) is required.
- 3.2 This question is about the vendor's duty to show title under s 13 CPO using certified true copies of documents and whether, as part of the vendor's duty to give title, the vendor must be able to explain the circumstances of the loss of the original of the 2005 Assignment. See *De Monsa Investments Ltd v Whole Win Management Fund Ltd* (2013) CFA. Note that there is no need to prove the contents of the missing 2005 Assignment because the vendor has supplied a certified true copy.
- 3.3 Candidates should consider the impact on title of the Deed of Gift and ss 49 and 51A and B of the Bankruptcy Ordinance Cap. 6 and s 60 CPO. In view of these provisions, a bankruptcy search should be made against the donor, Mary Lee. Most candidates did not deal with this.

Candidates should also consider whether Mary Lee has retained an equitable interest in the property (see *Suen Shu Tai v Tam Fung Tai* (CACV 187/2013) which would bind the purchaser who would have notice by virtue of Mary's occupation.

- 3.4 Payment of the further deposit is independent of signing under Clause 2(b) of the Agreement. See *See To Keung v Sunnyway Ltd* [2009] 5 HKLRD 300.

Question 4

- 4.1 This question concerns building works which potentially breach s 34I BMO because the extension into the light well is an extension into common parts (see s 2 and the First Schedule to the BMO). The building works also breach clause 8 of the DMC and potentially also breach the Buildings Ordinance (BO). Candidates must consider whether Clause 12 of the Agreement effectively bars requisitions or objections. See *Jumbo King*

Ltd v Faithful Properties Ltd (1999) 2 HKCFAR 279 and *Channel Green Ltd v Huge Grand Ltd* [2015] 1 HKLRD 655. The defect seems to be apparent from a comparison of the property with the layout plan with the deeds. Hence the vendor is likely to be aware of the defect. In this case therefore very clear wording is required to shift the risk of the defect to the purchaser.

- 4.2 As the requisition is late, candidates should consider whether the vendor is required to reply and whether the defect goes to the root of the title. Arguably it does, because the defect is serious and there is a real risk of enforcement action under the BO and DMC. The vendor must give good title even if he is not required to answer the requisition: *Strong & Associates v Flywin Co Ltd* [2002] 1 HKC 54.

Question 5

- 5.1 The purchaser must pay Ad Valorem Duty under Scale 1(the higher scale) in this case because he already owns a residential property. However, the purchaser may apply for a refund of half the duty if he disposes of his current residential flat within 6 months. The purchaser is also liable for Special Stamp Duty because the vendor is disposing of the property less than 6 months after acquiring it.
- 5.2 This question is about whether the purchaser has repudiated the sub-sale agreement by failing to pay the balance of purchase price on time. The obligation of the purchaser to pay is however, dependent on the ability of the vendor to hand over the Assignment executed by the head vendor unless the parties have agreed beforehand to complete by way of undertaking. See *Chong Kai Tai v Lee Gee Kee* and *Wellfit Ltd v Poly Commence Ltd* [1995] 3 HKC 65, PC.

Candidates should also consider whether the vendor can forfeit a deposit of 15% of the price and in particular whether the vendor can show exceptional circumstances justifying a deposit which exceeds 10% of the price. See *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 134 and *Richly Bright Ltd V De Monsa Investments Ltd* FACV 12/2014.

- 5.3 This question is about damages for breach by a sub-purchaser of a sub-sale agreement when the vendor under the sub-sale agreement does not complete the head agreement and is not left holding the property. The vendor's loss is the difference between the price at which the vendor agreed to buy and the price at which the vendor agreed to sub-sell: *Richly Bright Ltd V De Monsa Investments Ltd* FACV 12/2014. The vendor must give credit for any deposit forfeited.